

CALIFORNIA INTEGRATED WASTE
MANAGEMENT BOARD
ENFORCEMENT ADVISORY

DRAFT

~~March 12, 1997~~

Revision 1 August 2001

Prepared for Granlibakken

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List of Attachments

No attachments have been updated as of August 2001. The attachments will be updated before the revised advisory is finalized.

Attachment 1, Letter from Board to LEAs regarding implementation of Cease and Desist requirements for unpermitted facilities (PRC section 44002)

Attachment 2, Sample Notice of Violation

Attachment 3, Sample Compliance Agreement and Compliance Schedule

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I. INTRODUCTION

GOALS AND SUMMARY

The goal of this Local Enforcement Agency (LEA) Advisory (advisory) is to assist and guide LEAs in taking any necessary enforcement actions to achieve facility compliance with solid waste laws and regulations and protect public health and safety and the environment. This advisory discusses LEA enforcement responsibilities and describes various enforcement options available to LEAS to remedy violations of solid waste laws and regulations, including both State Minimum Standards (SMS) and Solid Waste Facilities Permit (SWFP) violations. Detailed guidance on developing and implementing each enforcement option is included as well as clarification of statutes and regulations where needed.

Changes and additions to the Public Resources Code (PRC) and the California Code of Regulations (CCR) brought about by the passage of AB 59, effective October 16, 1995, have been incorporated into this advisory, including a separate section on procedures and guidance for pursuing Administrative Civil Penalties (ACP). It should be noted that changes in the PRC brought about by AB 59 necessitated changes and additions to Title 14, California Code of Regulations (14 CCR) regarding enforcement actions for solid waste facilities. Development of the Enforcement Regulations to include some of those changes and additions ~~will begin early in 1997~~ were completed in 2001. ~~Once the regulations become effective, this advisory will be updated as necessary and reissued to all LEAS.~~

This advisory is an integral part of the Board's overall Enforcement Policy Framework as approved by the Board in October of 1996 and is intended to partially fulfill the Board's responsibility to provide assistance and guidance to LEAs in matters of enforcement. ~~As a follow up to this advisory, Board staff is planning joint Board and LEA training and workshop sessions designed to improve the effectiveness and efficiency of enforcement implementation and promote information sharing between LEAS regarding which enforcement strategies work best in particular situations.~~

LEA ENFORCEMENT RESPONSIBILITIES

Each **Local Enforcement Agency (LEA)**, or the Board when acting as the enforcement agency, is responsible for enforcement within its jurisdiction regarding solid waste handling and disposal, pursuant to Division 30, Public Resources Code (PRC), § 43209, and Title 14, California Code of Regulations (CCR) § 18081(c) and § 18084 including:

- Applicable Provisions of Division 30. Part 4 of the PRC
- Regulations adopted under Part 4, including 14 CCR sections 17200-~~17870~~ 17419.2 State Minimum Standards for Solid Waste Handling and Disposal (SMS), [citations for appropriate sections of 27 CCR] sections 20030-20050, 20150-20164, 14 CCR sections 18080 - 18224~~6~~, and ~~18250-18277~~ [citations for appropriate sections of 27 CCR] Administration of Solid Waste Facilities Permits and Closure/Post Closure Maintenance Plans, and any local standards
- Solid Waste Facilities Permit (SWFP) Terms and Conditions

Whenever the LEA identifies SWFP or SMS violations at a facility or operation they are required to take appropriate enforcement action. 14 CCR § 1808 1(c) & (d) requires that all facilities, operations and disposal sites within an LEA's jurisdiction shall be in compliance with SMS, the terms and conditions of the SWFP, be permitted or exempted, or be under appropriate enforcement action(s) pursuant to 14 CCR § 18084 to remedy the violations. Furthermore, it is the policy of the Board to ensure that LEAs enforce SMS and SWFP terms and conditions consistently and equitably among public and private facilities. A variety of enforcement options are available to LEAs to bring facilities into compliance and are described in PRC sections 43000-45024 and 14 CCR sections 18301- 1834~~307~~.

LEA RECORDKEEPING

Pursuant to PRC § 43209(f) and 14 CCR 18020, LEAs are responsible for maintaining records for each disposal site and facility within their jurisdiction. Specifically, the LEA must maintain a separate and current chronological log of legal and enforcement actions. This file shall include, at a minimum, the following information: facility or site name, address, SWIS number, the action type, the date the action was taken, and the outcome of the action(s).

BOARD RESPONSIBILITIES

As required by PRC §~ 4310l(b)(8), 43217, 43219(b), 43220, 43302 and 14 CCR §18350(c), the Integrated Waste Management Board's (Board) primary functions regarding an LEA's inspection and enforcement program are to:

- Provide technical assistance, training, support and guidance to LEAs.
- Ensure an LEA's performance in keeping the facilities in their jurisdiction in compliance with applicable laws and regulations, by conducting periodic inspections at those facilities and, if necessary, encouraging LEAs to take enforcement actions.

Secondarily, the Board is to function in place of an enforcement agency when it is determined that the LEA has failed to take appropriate enforcement actions, and they are unable or unwilling to do so. Various statutes and regulations describe the Board's authority, responsibilities and options when an LEA fails to take appropriate enforcement action to remedy documented violations. These include PRC §~ 43214, 43215, 43216, 43216.5, 43219(c&d), 43300, 45012, and 14 CCR 18350

APPROPRIATE ENFORCEMENT ACTIONS

This advisory is intended to provide LEAs with a comprehensive reference document for use when taking enforcement actions at solid waste facilities. It is not intended to prescribe or define what the appropriate enforcement action should be for any particular situation. Each LEA has its own Enforcement Program Plan (EPP), which they follow when taking action on violations. LEAs have flexibility and discretion in determining appropriate enforcement actions when dealing with individual jurisdictions, facilities and issues. Effective and efficient enforcement resulting in timely operator compliance should be the goal of any LEA actions with an emphasis on results rather than any particular process. There are however, specific cases where statutes or regulations require specific enforcement actions to be taken by an LEA for particular situations. Those are discussed below. In other cases where there is no mandated

enforcement response, the LEAS may determine which actions are appropriate for a particular situation, consistent with their individual Enforcement Program Plans and in conformance with procedural and content requirements found in statutes and regulations.

In reviewing LEA enforcement performance, the Board will focus on chronic violations and violations, which threaten public health and safety or the environment. A **chronic violation** is any violation for which a facility is listed in the Inventory or a Significant Change permit violation (PRC § 44004), which has remained uncorrected for 5 consecutive months. A chronic violation or a violation, which threatens public health and safety or the environment, will prompt Board staff to initially look at the operator's progress toward achieving compliance, rather than any particular action the LEA may or may not be taking. ~~However, if progress toward compliance is not forthcoming, the Board will consult with the LEA to determine if they are increasing their enforcement response accordingly by taking additional action(s). If not, the Board will make every effort to assist and encourage the LEA to take appropriate enforcement action to remedy the violation. As a last resort, should the LEA be unwilling or unable to take appropriate enforcement action, the Board may take its own enforcement actions.~~ Re-write this to be consistent with 14 CCR 18084 & 18350

MANDATED ENFORCEMENT ACTIONS

LEAs must take the following enforcement actions for specific violations or situations:

- If the LEA determines that a solid waste facility is operating without a permit, PRC § 44002 requires the LEA, as of October 16, 1996, to issue a cease and desist order pursuant to PRC § 45005 to immediately cease operations. For clarification on the applicability of this requirement, please refer to the August 20, 1996, letter from the Board to all LEAs on this subject, included as Attachment 1.
- If a facility is included on the Inventory of Solid Waste Facilities Which Violate State Minimum Standards, the LEA is required to develop a compliance schedule in writing, which ensures that diligent progress is made by the operator to bring the facility into compliance (PRC § 44106.) Board staff is available to review and comment on draft compliance schedules upon LEA request. LEAs can contact their Board enforcement liaison for this type of assistance. The compliance schedule may be a stand-alone document or it may be incorporated into a Notice and Order or a Stipulated Order of Compliance, both of which are discussed below under Enforcement Options.

II. ENFORCEMENT OPTIONS

Enforcement options, which an LEA can use to bring a facility into compliance, are described in this section. Some of the options such as a Notice of Violation or a Compliance Meeting are not found in statute or regulations. They are intended to serve as recommended examples of less formal intermediate steps between the inspection/inspection report and more formal and severe actions such as the issuance of a Notice and Order. Each LEA should have their enforcement program outlined in their enforcement Program Plan (EPP.)

INSPECTIONS AND NOTIFICATION OF VIOLATIONS

This section discusses ~~the most elementary level of enforcement~~, inspections and notification of violations, which include those actions that are meant to clearly document and notify a facility owner/operator of violations of laws or regulations and of the LEA's expectations regarding their correction. These actions may also notify the operator of the possible consequences of continued noncompliance. These actions include:

- ~~Inspection/Inspection Report~~ **[Not an enforcement action]**
- ~~Notice of Violation~~ **[Not an enforcement action]**
- Issuance of 90 day Notice of Intent
- Compliance Meeting/Compliance Agreement/Compliance Schedule

Note: The 90 day Notice of Intent is a mandatory action taken by Board staff pursuant to PRC § 44104, based on facility compliance information as documented in the LEA's inspection reports. (See details below)

| Inspection/Inspection Report

LEAs are required pursuant to PRC § 43218 and 14 CCR § 18083 to inspect all solid waste facilities and sites at specified frequencies. ~~Enforcement action typically starts with an inspection of the solid waste facility or site using applicable statutes and regulations.~~ At the time of an inspection, the LEA should identify and document all violation(s) and areas of concern. During an exit interview, the inspector should discuss any violation(s) and areas of concern with the operator. After an inspection, an inspection report is issued to the owner and/or operator or mailed using the appropriate Solid Waste Information System (SWIS) inspection forms. The form identifies actual violations as well as areas of concern, which have the potential of becoming a violation. Comments regarding the specific nature and location of the violations are also included as applicable. ~~The report may generally direct the operator to take action to correct the violations or request a work plan for correction.~~ In addition, all previously documented violations, which have been corrected since the last inspection should be noted as such. (See LEA Advisory # 15 for further guidance on filling out SWIS forms and LEA Advisories if 20 and 23 for further guidance on conducting and documenting a landfill inspection or a transfer/processing station inspection respectively.)

| Notice of Violation

A Notice of Violation (NOV) is a separate notice to the operator, usually as a follow up to an inspection report, which serves to focus the operator's attention on a particular violation and the need to correct it. It may be used for chronic violations where the operator has failed to respond to the LEA's inspection reports or for more serious violations. In the latter case, the LEA may wish to immediately impress upon the operator the seriousness of the violation and the need for quick corrective action.

The NOV should include comments regarding the specific nature and location of the violations, and, as applicable, may direct the operator to take corrective actions by a specified date or request a work plan for correction with a specified date for submittal by the operator for EA review and approval. The work plan should consist of a description of actions for correcting the violations and specific dates by which the actions will be completed. The NOV may also be used to request the operator to contact the LEA to set up a compliance meeting. Additionally, the consequences for continued non-compliance, such as the issuance of a Notice and Order by the

LEA with potential assessment of ACPs, or a 90 day Notice of Intent to include the facility on the Inventory by the Board, may be spelled out in the NOV. A NOV is not specifically referenced in statute or regulation but can be considered a part of the process, which provides the operator a reasonable opportunity to bring the facility into compliance (due process) prior to assessing Administrative Civil Penalties pursuant to PRC § 45010 and 45011. In this case, the LEA should include in the NOV, a notification to the operator of their right to a compliance meeting. An example of a NOV is included in attachment 2.

Note: Examples of enforcement documents in the appendices are offered in response to various LEA requests and are not intended to be mandated formats for all LEAs to conform with, but are merely one possible format.

| Issuance of a 90-Day Notice of Intent (NOI)

Board and LEA staffs implement the Inventory of Solid Waste Facilities Which Violate State Minimum Standards (Inventory) as required by PRC § 44104. Facilities are routinely surveyed every two months by Board staff using LEA inspection reports. Any facility, which has a repeat violation for the same standard during the two-month survey period, is issued a NOI. For example, any facility violating one or more state minimum standards during September, which was not corrected in October, would be issued an NOI. The process would then be repeated for the next two months, November and December, then January and February etc. The NOI informs the operator of the continuing violations and gives them 90 days to correct them. Failure to correct the violations as documented by the LEA results in inclusion of the facility on the Inventory

Once a facility is included on the Inventory, PRC § 44106 requires the LEA to develop a written compliance schedule, which will ensure that diligent progress will be made to bring the facility into compliance. The compliance schedule may be a stand-alone document or in the form of a N&O pursuant to PRC § 45011. Should the owner/operator fail to comply with the compliance schedule, the LEA as appropriate must take further enforcement action. Facilities already operating under an enforcement order prior to being included in the Inventory can continue to work under the existing order unless it needs to be revised.

| Compliance Meeting/Agreement/Schedule

There is a point in the enforcement process when compliance meetings may provide a valuable tool to bring about compliance. Relatively serious or repeat violations that have not been corrected as a result of previous inspection reports or a NOV could trigger a compliance meeting. Additionally, prior to the issuance of an order, which imposes an administrative civil penalty, an operator may request a compliance meeting pursuant to PRC § 45011(b)(2).

If a previous enforcement action has been ineffective in gaining compliance or if a violation(s) is chronic in nature, or is seen as a potential threat to public health and safety or the environment, the LEA may schedule a formal meeting with the operator and/or owner, and other appropriate regulatory agencies. The purpose of the compliance meeting is to discuss the specific violation(s) and determine how compliance may be obtained without having to initiate further enforcement actions. The LEA should attempt to identify what kinds of obstacles, if any, are preventing the operator from correcting the violations, and work with the operator to find solutions to expeditiously correct them. All parties should agree on the corrective measure(s) and

timetable for correction. If no agreement can be reached, a N&O may need to be issued. During the meeting, it should be explained that failure to make acceptable progress toward the correction of violations would result in enforcement action(s) such as a N&O. Compliance meetings may be held with or without the benefit of prior enforcement action(s), as appropriate.

The LEA should draft a summary of the compliance meeting including the date, time, location, parties present, reason for the meeting, the violations or problems discussed, and the results of the meeting, including any agreements or resolutions regarding further actions by either party. It is requested that the LEA mail the summary to the participants and Board enforcement staff for inclusion in the facility file. By including it in the Board's facility file, a complete chronicle of LEA enforcement actions is made available to the public in the event of a records request regarding the subject facility. It also enables Board staff to document progress toward compliance in the SWIS database.

A compliance agreement may be the result of a compliance meeting. This is a written agreement between the owner/operator and the LEA including a work plan, which specifies a timetable and remedial actions that are acceptable to both. The plan should outline a program for assuring continued compliance, including a description of the actions and resources, equipment, personnel, and quality control measures to be used to achieve compliance. When a compliance agreement is used, it is usually not acceptable for an operator to simply state that he or she will comply with a particular standard. The operator should be held to specific dates to report progress on the completion of each task and by which all violations will be corrected. (See attachment 3 for examples of a compliance agreement, and a compliance schedule).

A compliance schedule could be proposed by the operator and approved by the LEA or dictated by the regulatory agency. Operator agreement on the conditions and timeframes in the compliance schedule may not necessarily be sought if severe violations exist. Compliance schedules may result from compliance meetings/compliance agreements, from a NOV, or a Notice and Order (PRC § 45011(b) and 14 CCR §18304). Also, when a site is included in the Inventory, the LEA must develop a compliance schedule to ensure that diligent progress is made to bring the facility into compliance (PRC § 44106).

NOTICE AND ORDERS 14 CCR 18304-18304.5

LEAs have the authority and responsibility to pursue ~~more serious~~ enforcement actions and legal measures to correct any SMS or SWFP violations, as necessary. This section describes the Notice and Order process, including specific guidance on development, issuance and follow-up enforcement should the operator fail to comply.

A Notice and order should be issued when the LEA determines that any facility disposal site, operation or person (s) is:

- In violation of Division 30 of the PRC;
- In violation of any regulations adopted pursuant to Division 30; or
- In violation of any of the terms or conditions of the solid waste facility permit under which the facility or disposal site is operating;
- Causes or threatens to cause a condition of hazard or pollution; or
- Poses a potential or actual threat to public health and safety or the environment.

In order to reduce overlap, LEA staff should be familiar with the regulations of other state and local agencies within its jurisdiction, which have the authority to regulate the design, operation or closure of a solid waste facility. The LEA should coordinate action relating to solid waste management with the appropriate local, state, and federal agencies based upon jurisdiction and should request enforcement response by the appropriate agency when indicated (PRC § 43209(b).) This includes consultation with the local health agency concerning enforcement actions, which involve health standards included in PRC § 43209(g). In addition, LEAs should coordinate with local Air Districts regarding responses to odor complaints from composting facilities pursuant to PRC §43209.1 (see LEA advisories # 32 and 33 for Board guidance).

In rare cases when an enforcement response is anticipated by both the LEA and an additional regulatory agency (local, state, or federal), the action should be coordinated to avoid duplication. Examples of agencies which may regulate certain aspects of a solid waste facility are: State Department of Health Services, Department of Toxic Substance Control, State Water Resources Control Board, Regional Water Quality Control Boards, and the Local Air Pollution Control or Air Quality Management Districts.

Basic Information

The following information is required to be included in a N&O pursuant to 14 CCR 18304(b):

- The identity of the enforcement agency
- The name or names of each person or entity to whom it is directed
- A description of the facility, operation or site where the violation was documented with a specific description of the location of the violation
- A description of the violation
- The statutes, regulations or permit terms and conditions the EA has determined are being violated
- A schedule, as described in section 18304.1(a), by which the operator is to take specified action(s)
- The penalty for not complying within the specified schedule, as described in section 18304(b)
- A notice informing the owner/operator of their right to appeal the notice and order to the hearing panel under PRC 44307.
- The date of issuance and signature of an authorized employee of the EA

14 CCR 18304(e) requires the LEA to attach to the N&O a declaration or affidavit of an employee of the EA stating that the allegations contained in the N&O are based upon either personal knowledge or information and belief. If the basis of the allegations is personal knowledge, the LEA should state how that knowledge was obtained, including the date of any inspection. If the basis of the allegations is information and belief, the BA should state generally the source of the information. However, the LEA is not required to divulge the identity of an informant.

Types of Notices & Orders

A notice and order must include at least one or the orders listed below and all of the applicable notices listed below.

Orders 14 CCR 18304.1

- 1) The LEA may issue a **Corrective Action Order** requiring the owner or operator of a facility, disposal site, or operation to take a corrective action [a specified action by a specified date] to abate a nuisance, or to protect human health and safety or the environment. (PRC ~ 45000.)
- 2) The LEA also has the authority to issue a **Cease and Desist Order** to the owner or operator to cease and desist any improper action by a specified date. This order can be used to address SWFP or SMS violations, facilities operating without a SWFP or situations, which threaten to cause a condition of hazard pollution or nuisance. (PRC § 45005.

Note: A cease and desist order must be issued when a solid waste facility is operating without a permit or an operation is operating without proper notification.

- 3) A **Compliance Schedule Order** may also be issued pursuant to PRC § 4501 1(a)(1), to bring a facility, disposal site, or operation into compliance with the PRC, 14 CCR or 27 CCR regulations, any corrective action order or cease and desist order, or if the facility poses a potential or actual threat to public health and safety or the environment. The order establishes a compliance schedule according to which the facility, disposal site, or operation will be brought into compliance with the documented violations. The order may also provide for Administrative Civil Penalties (ACP) to be imposed if compliance is not achieved within the established time schedule.

Note: Prior to issuing a N&O, which proposes to levy ACPs for failure to comply by compliance deadlines, the LEA must do both of the following:

A) Notify the operator of the solid waste facility, disposal site, or operation that the facility, disposal site, or operation is in violation, specifying the PRC or CCR code section or the permit term or condition being violated. This will normally be accomplished by the issuance of SWIS inspection reports and perhaps an NOV or other method of operator notification. In the SWIS form or the NOV the LEA should inform the operator of the right to request a compliance meeting. Also, the LEA may wish to include a statement that failure to correct the violations may result in the pursuit of ACPs.

B) Upon the request of the operator of the solid waste facility, disposal site, or operation, hold a compliance meeting with the operator of the solid waste facility, disposal site, or operation to clarify regulatory requirements and to determine what actions, if any, that the operator may voluntarily take to bring the facility, disposal site, or operation into compliance by the earliest feasible date. (Refer to the section on Assessing Administrative Civil Penalties for complete details on the ACP process).

The EA may choose to combine in one N&O any of the three types of orders discussed above. For example, an EA may wish for the operator to both cease and desist specified actions *and* take corrective action to clean up and abate specified conditions. An EA may also want to order the operator to take other actions as necessary to correct a violation by a specified date pursuant to a compliance schedule. Additionally, any of the various types of Notices discussed below can be incorporated into a N&O in different combinations in order to customize an EA's enforcement response.

When the owner/operator violates SMS, which do not also constitute a hazard, pollution, or nuisance then a corrective action order, cannot be issued. In such a case, the N&O may include an order to cease and desist or a time schedule by which the facility will be brought into compliance, and any applicable notices. (PRC §§45005, 45011 and 14 CCR § 18304.) The following are notices when applicable, are required to ~~may~~ be included in a N&O:

Types of Notices 14 CCR 18304.1

- 1) Notice informing the owner/operator that the LEA may contract for corrective action if the owner or operator fails to comply by the deadline in a final order. (PRC § 45000.)
- 2) ~~Option 1:~~ Notice informing the owner/operator that the enforcement agency may take action to impose **Administrative Civil Penalties (ACPs)** upon failure to comply with applicable compliance deadlines in a final order.
- 3) ~~Option 2:~~ Notice informing the owner/operator that the enforcement agency is conditionally imposing **Administrative Civil Penalties** in a specified amount, and will be due and payable should the operator fail to comply with applicable compliance deadlines in a final order. (PRC § 45011.) Under this option, the LEA would concurrently notify the governing body of its intent to impose ACPs. For more details on # 2 & 3 ~~options 1 and 2~~, please refer to the section on Assessment of Administrative Civil Penalties.
- 4) Notice informing the owner/operator that failure to comply by the deadline in a final order may result in the LEA petitioning the superior court to enjoin the violations, and that continued violation after the granting of an injunction may be punishable as contempt of court. (PRC § 45014 (a&b).)
- 5) Notice informing the owner/operator that upon failure to comply with a compliance deadline, the enforcement agency may bring an action in the superior court to impose upon the owner/operator civil penalties. (PRC § 45014(c) & 45023.)
- 6) Notice informing the owner/operator that the enforcement agency may take action to suspend or revoke the permit for the facility upon failure to comply with applicable compliance deadlines in the final order. (PRC §§ 44305 & 44306.)

The EA ~~may~~ is required to incorporate any of the notices above (as applicable) in any combination into a N&O. ~~It is recommended that the EA include as many notices as are applicable to the situation~~ to give greater flexibility in enforcing the order should the operator fail to comply.

Please note that the LEA can only take corrective action or collect ACPs upon failure of the operator to comply with a final Notice and Order. (See section on Requests for Hearings; Final Orders, on page 42- ~~XX~~ for the definition of a final order). However, the last three potential actions listed in the Notices above (court action to enjoin violations, court action to assess Civil Penalties, or action to suspend or revoke a SWFP) can be initiated in one of two ways:

- upon failure of the operator to comply with a final order, or;
- independently of the N&O process

For example, an LEA can file an action in superior court to enjoin a violation or assess civil penalties at any time, regardless of whether a N&O has been issued, or, if one has been issued, whether or not it has become final. Although the statutes allow for the LEA to take these types of actions independent of the N&O process, it is recommended that the LEA only pursue this option in cases where the operator intentionally or negligently violates SWFP or SMS requirements which result in a threat to public health and safety or the environment.

Stipulated Notice and Orders

Typically, the LEA without the consent of the operator issues a Notice and Order unilaterally. A Stipulated Order of Compliance (Stip) has been used in the past by LEAs as an alternative to the Notice and Order. The operator who agrees with its terms and conditions signs a Stip. Both types of enforcement actions describe the existing violation(s) and direct the operator to take specific corrective action(s) by a specific date(s), and include Notices that non-compliance may result in further enforcement action. The main difference between a Stip, and the compliance agreement discussed on page 6, is that the Stip contains notices or remedies regarding further enforcement action for non-compliance, whereas the compliance agreement does not. The Stip is generally for more serious violative conditions, or for when the LEA feels that a threat of more serious enforcement action for failure to comply is needed.

A Stip is not addressed in current statute or regulation. It is recommended that LEAs consult with their legal counsel to discuss whether a N&O or a Stip is more appropriate for any particular case. However, it may prove to be a valuable tool because an operator would be unlikely to request a hearing pursuant to PRC § 44307 regarding an enforcement action that it agreed to in the Stip.

~~Note: Templates of a Notice and Order, Stipulated Order of Compliance, and a Declaration were previously sent to all LEAs. Please contact your Board enforcement liaison should additional copies be needed.~~

N&O Development

Time frames for drafting and issuing a N&O will vary, depending on the type and severity of the violation, the existence of a threat or potential threat to public health and safety or the environment, the LEA's local policies and procedures for legal review and approval, and other factors. However, if a site is threatening public health or safety, and the LEA has decided to issue a N&O, a maximum of 24 hours is recommended for drafting and issuing the N&O.

Prior to issuing N&Os, the LEA should consult with the other appropriate environmental regulatory agencies. In addition, the EA should consult with the local health agency concerning enforcement actions, which involve health standards. (PRC § 43209.) Written notification to other agencies is required 10 days prior to the issuance of a N&O, which involves violations that may also be under the jurisdiction of another state regulatory agency. (Consult PRC § 45019 for the specific agencies and the details for noticing). Although not required by statute or regulation, it is requested that the EA provide their Board Permitting and Inspection ~~enforcement~~ contact with a draft copy of enforcement orders for a 5 working day review and comment period. This time frame can be much shorter, particularly in an emergency situation, by working with the appropriate ~~enforcement~~ Permitting and Inspection branch liaison at the Board. In addition, the LEA is required to transmit enforcement orders to the Board within 5 business days of issuance. (14 CCR § 18304.)

Requests for Hearings; Final Orders 14 CCR 18304.2

When an operator receives a N&O, a request may be made to the LEA to hold a hearing pursuant to PRC § 44307 and 44310. The request must be made within 15 days of receipt of the N&O, which should be sent return receipt requested. In order to satisfy due process, it is recommended that the LEA place language in the cover letter of the N&O regarding the operator's right to a hearing, including the time frame for requesting a hearing.

Should a hearing be held, the operator may subsequently appeal the decision of the hearing panel to the Board or to the Superior Court. During the local hearing panel and appeal processes, the effect of the N&O is stayed, unless there is a substantial or imminent threat to public health and safety or the environment. (PRC § 45017). If the LEA determines that there is a substantial or imminent threat to public health and safety or the environment, it should be so stated in the N&O. If the operator requests a hearing in this case, the LEA should still schedule one. However, during the hearing and appeal process, the LEA should proceed as if the N&O was final, taking further enforcement actions as stated in the N&O if the operator fails to comply by the deadlines. Once the hearing panel and appeal process is completed and the order becomes final, the LEA can make any necessary adjustments in their enforcement actions, depending on the hearing panel's or Board's decision.

If the operator requests a hearing when there is no threat, and the effect of the N&O is stayed; an order may not become final for 90-120 days, when the hearing panel issues its decision. If the operator appeals the hearing panel's decision to the Board, another 70-120 days could go by before the Board issues its decision and the order becomes final. PRC § 44305 also provides for an emergency appeal hearing, where an LEA has suspended a permit. ~~An LEA Advisory providing detailed guidance on hearing panel and appeal procedures is currently planned by Board staff.~~

Final Orders (CCR 18304.2)

An **order** becomes final when either:

- 1) A N&O has been requested by the operator to be reviewed by the local hearing panel, and the hearing process has been completed pursuant to PRC § 44307 & 44310, and any subsequent appeals to the Board or Superior Court have been resolved pursuant to PRC § 45030 45042, or;

- 2) A N&O was not requested by the operator to be reviewed by the local hearing panel within 15 days of receipt. (PRC 44310).

| N&O Timelines and Extensions

Notice and Order timelines should allow a reasonable time for correction, with intermediate timeframes established for specific document submittals or other EA requirements, including a date certain for compliance with all SMS and/or SWFP terms and conditions. The dates are to be determined on a case-by-case basis, depending on the circumstances at each facility. No protracted compliance schedule should be incorporated into a N&O for any facility that has known environmental or public health and safety problems as a result of the violations.

Timelines should generally not be extended when the owner/operator does not comply with the requirements specified in the N&O. Instead, the EA should take the next enforcement action step as stated in the order. However, N&O extensions may be warranted where the operator has made a good faith effort to comply with the N&O but has experienced extreme, unforeseen circumstances, outside their control, which has directly resulted in failure to meet a N&O deadline. When extending deadlines, the LEA should document in the amended N&O the operator's good faith efforts, including tasks completed thus far, and the extenuating circumstances. Examples of extenuating circumstances outside of the operator's control might include acts of God such as inclement weather, earthquakes etc. or delays in obtaining discretionary permits or other government agency approvals.

ENFORCEMENT OF NOTICE AND ORDERS

The following actions to enforce a N&O may be taken by the LEA:

- Contract for Corrective Action to cleanup and abate
- Petition the Superior Court for injunctive relief
- Notify the operator and the governing body of the LEA's intent to impose Administrative Civil Penalties
- Petition the Superior Court for Civil Penalties
- Take action to Suspend or Revoke Permit

A determination of non-compliance with a Notice and Order should be made based on an LEA inspection documenting personal observation of failure to correct the conditions, which caused the issuance of the N&O. If the owner and/or operator fails to comply by the deadline in a N&O, the LEA may take action as specified in the N&O. (14 CCR § 18305). Enforcement of the N&O will depend upon which notices were included, and which one(s) the LEA chooses to proceed with.

Notice of Compliance Status (14 CCR 18304.4)

Thirty Days after the final deadline or expiration date in a N&O or compliance schedule issued by the LEA, a notice is required to be sent to board staff. This is a Notice of Compliance Status, which contains the LEA's determination whether the operator is in compliance with the

N & O or compliance schedule and whether the N&O has been completed, extended or enforced along with a justification.

Legal Representation

It is recommended that when actions require legal representation, the LEA should have the case file ready for referral to the appropriate counsel within 15 days of failure to comply with any N&O deadline. Additionally, 14 CCR § 18084(c) states:

“If in the course of an enforcement action, the LEA deems legal counsel to be necessary to achieve enforcement, compliance, relief or the assessment of monetary penalties through the courts, the LEA shall utilize legal counsel which will be prepared to initiate legal proceedings within 30 days of notification” (14 CCR § 18084(c))

The LEA should establish appropriate time frames with its legal counsel for the review of cases referred for legal action and the filing of further enforcement action. Details of this arrangement should be described in the Enforcement Program Plan. (14 CCR § 18077). The LEA should work with its legal counsel to identify all items to be included in the case file prior to referral. If the LEA is required to appear in court, the LEA staff that will appear should request legal counsel to provide a briefing on courtroom proceedings prior to the legal proceeding. The Board shall be notified in writing within 5 business days of any actions taken by the LEA to enforce a N&O. The notification must include a copy of any court documents that have been filed (14 CCR §18305.)

Corrective Action Order Enforcement

If an operator fails to take corrective action as specified in a final order by the compliance deadline the LEA or the Board may contract for the corrective action to be completed by an outside party. The owner or operator shall reimburse the LEA or the Board for the amount expended, including, but not limited to, a reasonable amount for contract administration, and an amount equal to the interest that would have been earned on the expendable funds. The amount expended shall be recoverable in a civil action by the Attorney General, upon request of the LEA or the Board (PRC §45000.)

Cease and Desist Order or Compliance Schedule Order Enforcement

Included in the Cease and Desist Order or the Compliance Schedule Order will be one or more of the last four types of notices described on pages XX 9 and 10 regarding actions that the EA may take if the operator fails to cease and desist illegal, unpermitted or violative activities or clean up violative conditions. On or after the date specified in the N&O, the local enforcement agency may take action. The action will of course depend on the notice(s) included in the N&O, which are elaborated on below.

I Administrative Civil Penalty (ACP) Notice Enforcement

Option 1: If the final N&O includes a notice which states *“the enforcement agency may, on or after a specified date, take action to impose upon the operator, administrative civil penalties”*, then once the specified date has passed, the LEA may initiate enforcement of the

notice by issuing a Notice and Order for Penalty Assessment (NOPA) to the operator with a copy sent to the governing body regarding its intent to impose ACPs.

Option 2: If the final N&O includes a notice which states “*the enforcement agency is conditionally imposing administrative civil penalties in a specified amount, and will be due and payable upon failure to comply with applicable compliance deadlines in a final order*”, then once the specified date in a final order has passed, the LEA will notify the operator of the exact amount of the penalties and that they are now due and payable.

Note: Please see the detailed section on ACP assessment for complete information on enforcement of this notice. A sample NOPA is included as Attachment 7. Also, for a summary comparison of Administrative Civil Penalties vs. Civil Penalties, please refer to the Civil Penalty section below.

| **Superior Court Injunction Notice Enforcement**

If the final N&O includes a notice which states that, “*the enforcement agency may, on or after a specified date, petition the superior court to enjoin the violations, and that continued violation after the granting of an injunction may be punishable as contempt of court*”, then after the specified date, the LEA may refer the case to its legal counsel and enforce the N&O by appropriate petition or complaint filed in superior court. As an alternative, the LEA may contact the Board’s legal counsel and request their assistance or the Attorney General’s assistance to pursue the injunctive relief. The Attorney General is required by law in this case to pursue the injunction if so requested by the Board (PRC § 43215.1, 45014 (a&b), & 14 CCR § 18305.)

| **Civil Penalty (CP) Notice Enforcement**

If the final N&O states that, “*the enforcement agency may, on or after a specified date, bring an action in the superior court to impose upon the owner, operator, or both civil penalties*”, then once the specified date has passed, the LEA may refer the case to its legal counsel and enforce the notice by appropriate petition or complaint filed in superior court. Again, as an alternative, the LEA may contact the Board’s legal counsel and request their assistance or the Attorney General’s assistance to pursue civil penalties (PRC § 45023, 14 CCR § 18305.)

Comparison of Administrative Civil Penalties vs. Civil Penalties: Administrative Civil Penalties are imposed directly by the LEA, and can only be pursued upon failure of the operator to comply with the deadlines in a final N&O. Penalty amounts are limited to \$5,000 per day per violation with a \$15,000 limit per facility per calendar year. In contrast, Civil Penalties are imposed by the courts upon petition by the LEA and may be pursued for failure of the operator to comply with the deadlines in a final N&O, or independently of the N&O process. The fines can be up to \$10,000 a day per violation with no limit on the total fine amount.

| **Permit Suspension/Revocation Notice Enforcement**

Permit suspension or revocation proceedings can be initiated in one of two ways:

- 1) As the result of an operator’s failure to comply with deadlines in a N&O. The N&O would serve as the notification required by PRC § 44305 or 44306 and 44310.

2) At any time, as long as the LEA notifies the operator pursuant to PRC § 44305 or 44306 and 44310 of their intent to suspend or revoke the permit. The notification should be sent to the operator at least 15 days prior to taking any action to suspend or revoke the permit.

In either case, once any necessary hearings and appeals have been conducted, the LEA may take the applicable action. The hearing and appeal process for suspension or revocation is the same as that for the issuance of a N&O. If the LEA determines that changed conditions at a facility necessitate a permit revision ~~or modification~~ to prevent or mitigate an imminent and substantial threat to the public health and safety or to the environment, the LEA may suspend the permit prior to holding a hearing. The operator may appeal this action and a hearing must be conducted within three business days of the permit suspension (PRC § 44305).

Permit Suspension; ~~Modification or Revision~~

The LEA may temporarily suspend a SWFP if the LEA determines that changed conditions at the facility necessitate a permit revision ~~or modification~~ to eliminate a significant threat to public health and safety or to the environment. (PRC § 44305(a)). The LEA would then cause the operator to apply for a permit revision ~~or modification~~, process it in accordance with applicable statutes and regulations and forward the proposed permit to the Board for concurrence. The LEA may lift the suspension prior to the time the permit is ~~modified or~~ revised if the operator completes specified acts, which eliminate the significant threat. (PRC § 44305(c)). Otherwise, the suspension is lifted at the time the permit is reissued.

Permit Revocation

The LEA may revoke a SWFP if the LEA determines any of the following:

- The permit was obtained by a material misrepresentation or failure to disclose relevant factual information;
- The operator has, during the previous three years, been convicted of, or been issued a final order for, one or more violations of this division, regulations adopted pursuant to this division, or the terms or conditions of the SWEP, and the violation meets both of the following criteria:
 - 1) The violation demonstrates a chronic recurring pattern of non-compliance, which has posed, or may pose, a significant risk to public health and safety or to the environment.
 - 2) The violations have not been corrected or reasonable progress toward correction has not been achieved.

If a permit has been revoked, it may be reinstated by application for a new permit no less than one year after the effective date of the revocation. (14 CCR § 18212(b).)

~~Note: The existing section of the CCR which addresses permit modification, suspension or revocation is inconsistent with the new laws in the PRC which address these actions. 14 CCR § 18307 requires the LEA to file an accusation with the hearing panel to initiate these actions. The~~

PRC now requires the LEA to notify the operator of their intent to take action, then the operator must respond with a request for a hearing. If no hearing is requested, the LEA may proceed to take action without one. The CCR will be changed to conform with the existing statutes. In the interim, where a conflict exists between the PRC and the CCR, it is advised that LEAs follow the PRC when proceeding with these types of actions.

Permit Enforcement Policy (PEP)

This is a placeholder for the insertion of guidance related to the new PEP policy once it has been adopted.

III. ASSESSMENT OF ADMINISTRATIVE CIVIL PENALTIES

This section has not been revised yet.

IV. BOARD ASSISTANCE

LEGAL ASSISTANCE

General Assistance

~~The Board may, upon the written request of the Enforcement Agency, provide legal counsel for the purpose of bringing solid waste facilities into compliance with applicable laws and regulations. (PRC § 43215.1). Where the county counsel has a conflict or other constraint preventing them from assisting an LEA, the LEA can contact the Board's chief counsel to discuss the possibility of legal advice and assistance.~~ *We recommend deleting any reference to 43215.1. Any advice we give an LEA regarding a matter that might be appealed to the Board under AB 59 creates a potential conflict of interest for the Board's lawyers. That could lead to our being unable to represent the Board at an AB 59 hearing. Rather than flagging this for discussion at the Conference or in the Advisory, we suggest that you just eliminate the paragraph on "General Assistance."*

Cost Recovery for Corrective Action Expenditures

~~If an LEA expends funds to take corrective action at a facility, the amount expended shall be recoverable in a civil action by the Attorney General (AG) upon request of the LEA pursuant to PRC § 45000(d). The LEA should directly contact the AG's office to request representation in this type of case.~~ If an owner or operator fails to comply with an administrative order requiring corrective action under PRC 45000(a), the LEA may expend funds to take the necessary corrective action at the facility. The funds the LEA expends, together with certain other costs, are recoverable in a civil action by the Attorney General (AG) pursuant to PRC § 45000(d). The AG should file the action upon the request of the LEA. The LEA should directly contact the AG's office to request representation. The LEA may request the Board's Legal Office to assist in contacting the AG.

Petition for Injunction

a) If an owner/operator fails to comply with a final administrative order issued by the LEA, ~~the LEA can contact the Board's legal counsel to obtain assistance from the AG. Upon~~ The AG, upon the request of the Board, the AG shall petition the superior court for an a preliminary or permanent injunction, restraining the operator from continuing to violate the order (that is, an injunction to force the operator to comply with the LEA's order). (PRC 45014(a)). The LEA should contact the Board's legal counsel to obtain assistance from the AG. As an alternative, The LEA can utilize its own legal counsel in petitioning the superior court for an injunction or request direct Board assistance. (PRC # 43215.1 & 45014(b)).

b) ~~Apart from the administrative enforcement and penalty process, an LEA has the right to bypass the issuance of a N&O and go directly to superior court to obtain an injunction to enforce laws, regulations and the SWFP applicable to the facility. In this case, the LEA can utilize its own legal counsel, request board assistance or request AG assistance. However, in this case, the AG is not bound by law to assist, as in the case outlined above (PRC 45014(b)).~~ Section 45014(a), above, refers to situations where the LEA seeks an injunction to force a person to comply with a final administrative order issued by the LEA. In the more general situation, where the LEA seeks to enforce the Integrated Waste Management Act, any term or condition in a solid waste facilities permit, or any standard adopted by the LEA or the Board, it may seek an injunction following a proper notice and order.* Any attorney authorized to represent the LEA or the Board may file such an action in superior court PRC 45014(b).

Petition for Civil Penalties

~~The LEA can utilize its own legal counsel in petitioning the superior court for the assessment of civil penalties, request board assistance or request AG representation. Civil penalties may be sought as the result of an operator failing to comply with a N&O or directly, without the prior issuance of a N&O. (PRC § 45014(c), 45023 and 45024). The superior court may impose civil penalties on an owner or operator who intentionally or negligently violates, or causes or permits another to violate, the terms and conditions of a solid waste facilities permit, who operates a solid waste facility without a permit, or who intentionally or negligently violates any standard adopted by the Board. PRC 45023. Following a proper notice and order,* any attorney authorized to represent the LEA or the Board may file such an action in superior court. PRC 45024.~~

* Note: It can be argued that an LEA may petition the superior court for an injunction under PRC 45014(b) or PRC 45024 without having first issued a notice and order to the owner or operator in question. However, it is the Board staff's view that the preferable course is to precede any such petition with a proper notice and order with which the owner or operator has failed to comply.

TECHNICAL ASSISTANCE

Board staff has developed templates of the following documents for use by LEAs:

Notice and Order

Stipulated Order of Compliance
Declaration/Affidavit
Notice and Order for Penalty Assessment

These templates have gone through Board legal review. The Notice and Order for Penalty Assessment is provided as Attachment 7 **[These templates will be updated at a later date and included in this advisory]**. ~~The Notice and Order, Stipulated Order of Compliance and Declaration/Affidavit were previously provided to LEAs. Please contact your Board enforcement liaison for additional copies.~~

Additionally, Board staff is always available to assist LEAs upon request through review and comment on draft compliance schedules, N&Os, Stips or NOPAs. Board staff requests a 5 working day time frame for reviewing the document and sending the comments back to the LEA. Board staff is also available to confer with LEAs and assist in the development of overall enforcement strategies for a particular site or sites with multiple violations and/or complex enforcement issues. In cases where the LEA is unable to gain compliance through Notice and Orders or other appropriate actions, the Board is available to provide the LEA with technical enforcement assistance. In this case, it is strongly recommended that LEAs seek such assistance in a timely manner.

FINANCIAL ASSURANCES ASSISTANCE

The Board is directly responsible for enforcement of financial assurance violations. The Board's financial assurances section liaison for individual LEA jurisdictions should be contacted regarding enforcement of financial assurance violations at applicable facilities. Regulations designed to fully implement the financial assurances enforcement program have been developed and adopted by the Board ~~and are pending final Office of Administrative Law approval.~~